J.B. Hunt Transport, Inc. *and* Teamsters Local Union No. 17 a/w International Brotherhood of Teamsters, AFL–CIO. Case 4–CA–29035

August 23, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On March 21, 2001, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, J.B. Hunt Transport, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Patricia Garber and *Kimberly Nerenberg, Esqs.,* for the General Counsel.

Robert M. Stone, Esq., of Los Angeles, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Philadelphia, Pennsylvania, on December 7 and 8, 2000. Subsequently, briefs were filed by the General Counsel and the Respondent. The proceeding is based on a charge filed March 9, 2000,[1] by Teamsters Local Union No. 17, a/w International Brotherhood of Teamsters, AFL–CIO. The Regional Director's complaint dated June 29, 2000, alleges that Respondent J.B. Hunt Transport, Inc., of Lowell, Arkansas, violated Section 8(a)(1) and (3) of the National Labor Relations Act by discharging employee Gregory Griffin because of his union or other protected concerted activities.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged as a nationwide motor common and contract carrier of general commodities and it operates a terminal in Philadelphia. It annually performs interstate transportation services valued in excess of $50,000 and it admits that at all times material is and has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent's Philadelphia facility is engaged in providing contract carrier transportation services exclusively for Home Depot. Gregory Griffin was hired as a tractor-trailer driver on July 1, 1997, by Charles Pinkett, then a project manager trainee. Pinkett subsequently became project manager and was responsible for the day-to-day operations of the Home Depot account. Griffin became a senior driver collecting several awards in the course of his employment as well as a monthly safety and attendance bonus, which he received each month of his employment. Griffin had an excellent work record and Pinkett considered him 1 of the top 3 of some 55 drivers. Prior to his discharge, Griffin had a record of just two accidents, both determined to be nonpreventable (or not Griffin's fault).

The Respondent is a nonunion employer and it actively promotes this position to its management personnel. For example, at a conference for managers in Respondent's northeast region held in November 1998, Managers Chris DiPasquale and Brad Hicks received literature entitled "Union Awareness" which lists 13 reasons why a company would not want a union. The information also alerts managers to the steps of an organizing campaign and describes a process by which management learns of an incipient campaign. Its internal literature also states, "We are strongly opposed to unions" and a document called "What the Union Could Mean to You as a Supervisor" warns supervisors that: "Your job as a supervisor in a union company will be much more difficult, demanding, time-consuming and frustrating," as [your] authority . . . rights, and privileges [are] sharply undercut" and you are faced with "employees trying to get away with anything because they feel the union can protect them."

[1] On May 23, 2001, the Board issued a Decision and Order (334 NLRB 92) in this proceeding, before the Respondent had the full opportunity to file a reply brief, as provided under Sec. 102.46(h) of the Board's Rules. Consequently, by Order dated June 22, 2001, the Board vacated the May 23 decision for all purposes, including precedential effect as premature. The Respondent subsequently filed a reply brief, which reiterates the contentions contained in the Respondent's exceptions and supporting brief and does not contain any arguments not previously considered and rejected by the Board.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[1] All following dates will be in 1999 unless otherwise indicated.

Home Depot contracts for unloading and loading functions at the Philadelphia facility with USF Logistics. This company's employees began a union organizing campaign in the spring of 1999. The Respondent's managers contemporaneously began conducting "roundtable" meetings with its drivers, and solicited drivers to share their concern and emphasized that Respondent had an open door policy. Among the managers participating in these meetings were Brad Hicks, Albert Rivera, and Mark Tressler and during one meeting, Hicks specifically told the assembled drivers that Home Depot did not want a union at the facility.

The roundtable meetings continued over a period of several months and, as they came to an end, several employees, with Griffin as spokesman, proposed to management that an employee committee be formed to speak as the representative for all drivers. Management (Hicks in particular) embraced the idea, and a series of committee meetings with Hicks were held between August 1999 and the end of the year. In these meetings the drivers' committee focused primarily on issues related to compensation and Griffin presented a written proposal suggesting various wage enhancements. The proposal generated no response until early January 2000, when Tressler issued a memo granting a modest increase in holiday pay.

Griffin and other committee members felt rebuffed in their effort to obtain better pay and decided to contact the Union and in early February, they met with union representatives and got blank authorization cards. Griffin distributed authorization cards in the yard area where drivers parked their trucks both before and after his work shift. Between February 11 and 17, he collected 13 signed cards. Drivers sometimes gathered around him in groups of three to five, an unusual occurrence in the yard. On one occasion, Griffin observed Manager Hicks standing on the dock looking toward him and a group of other employees.

On Friday, February 18, Teamsters Local Union 17 filed a petition for an election with the Board, seeking to represent the Respondent's drivers. On February 22, the Board served the petition and a notice of hearing on Respondent (specifically Account Manager Tressler) by first class mail. The next day the Respondent's attorney faxed a letter to the Board submitting his notice of appearance and requesting that the hearing be rescheduled. The Respondent also assigned northeast Regional Operations Manager Chris DiPasquale to Philadelphia to assess the union situation. DiPasquale appeared at the facility on February 24 and thereafter the Respondent conducted a vigorous antiunion campaign. This included campaign literature in the form of a letter by Tressler and Hicks which warned that the Teamsters "thrive on fear and intimidation," and highlighting the violence associated with the Overnite strike as "textbook Teamsters."

Meanwhile, on February 14, Griffin had driven his tractor to the Philadelphia House of Corrections, a prison facility, to visit his brother. As he attempted to leave the parking lot he found his vehicles path blocked by a car. At the suggestion of a security guard, Griffin attempted to drive forward, off the paved parking lot and into a grassy area, however his tires began to spin in the soft grass and he found himself unable to move. He viewed his predicament as a "road service" situation under his driver's manual and he phoned Respondent's fleet support department, which dispatches local contractors to assist with emergencies. Fleet Support contacted Triangle Truck Service, which sent a wrecker and Griffin's vehicle was towed back onto the pavement.

On February 24, the day after Tressler received the election petition and the same day that Regional Manager DiPasquale began his assignment to Philadelphia, the Respondent became aware of "minor damage" to Griffin's truck when it was brought to a garage for its regular preventative maintenance service. The Respondent's repair order noted a broken light assembly (which Maintenance Manager Bill Goff said he could not detect was broken at first glance), as well as a mud flap that was "bent down," or "kind of twisted a little bit."

At that time Goff was the Philadelphia facilities' interim maintenance manager and as he was checking the repair order his computer showed the February 14 tow order for Griffin's vehicle. He was unaware of what might have occurred so he called the towing company. He also questioned other managers and told Hicks and DiPasquale about it. DiPasquale questioned Goff about the circumstances surrounding the tow order and concluded right then that if Griffin had gotten his truck so stuck in the mud that he needed a tow, then he "must have damaged the property." At that point, the Respondent did not alert Griffin to their concern nor did they have any documentary evidence from the tow truck driver. The next morning DiPasquale and Hicks went to the House of Corrections after receiving directions from the tow truck driver over the phone.

On February 25, DiPasquale made a written record titled "EVENTS LEADING TO DISCIPLINARY ACTION AGAINST GREG GRIFFIN." By DiPasquale's account, "[w]hen the truck began sinking in the ground the damage to the mud flap bracket and brake light assembly occurred." He further stated that "[t]he driver had taken his truck from work, without authorization, and was using it on personal business at the time of the incident." DiPasquale admitted that at the time he made these notations, he had no personal knowledge that the damage occurred when the truck became stuck in the mud, nor had he spoken to either Griffin or the tow truck driver about the incident. In his written record, DiPasquale also notes that he and Hicks "made a visual inspection of the area where the driver became stuck, and saw extensive damage to the landscape." According to the notes, they "started to take photos of the damage, but were told by a prison guard that we would need to get permission from the warden to continue. They then met with the warden and deputy warden and received permission to photograph the area. The notes say that the warden asked that we stay in touch with them, and that they would complete an investigation, and file an internal report." Although it was not included in this report, Warden Thomas Shields testified that Hicks offered on the spot to pay for the damage.

Warden Shields also testified that he never requested Respondent to reimburse the prison for the damage. Hicks, however, reported the exact opposite to the safety department, which recorded that "BRAD STTS THE WARDEN ASKED IF WE COULD TAKE CARE OF THE DMGS." The same assertion appears in Respondent's position statement to the Board, which claimed that "[t]he Department of Corrections has re-

quested that Hunt reimburse it for the costs of relandscaping the damaged area."

After returning from the prison, DiPasquale and Hicks spoke with Respondent's corporate safety department. They did not immediately classify the occurrence as an accident or collision, however, 2 hours later DiPasquale recorded that "we decided to speak with the driver, in regards to this unreported accident, on Monday morning," The notes also have one entry for, February 27, in which DiPasquale states that "the event has been classified as a preventable collision." The document notes that Tressler would conduct an accident review with Griffin on February 28. In notes recorded the next day, February 28, DiPasquale stated that Hicks would contact the prison to determine whether Griffin had visited there on February 14.

Respondent's investigation finally reached Griffin when he was told to report to a "safety meeting with Tressler on February 28. At that meeting, Managers Tressler and Ken Resta told him that they were conducting a fact-finding disciplinary meeting because they had received statements that his tractor was stuck in the mud on February 14, and he had failed to report it as an accident. Griffin replied that he did not view it as an accident, because he had been simply stuck in mud. They showed him photos of the grounds and Griffin told them that he could not say whether the photos depicted ruts he had made because there were already tracks in the ground when he got there. Griffin also asserted that he told them that Tressler had given him permission to take the truck, however Tressler's report memorializing the meeting, did not include this assertion or the statement Griffin's that there had been other tire tracks in the grass before he drove into it.

After the meeting, Respondent asked Quinn, the driver of the tow truck, to submit a statement concerning the tow as well as a map indicating the location where the tow took place. Quinn faxed a copy of a statement to Brad Hicks on February 29, along with a drawing. In his statement, Quinn noted that he was "dispatched to Philadelphia Prison by J.B. Hunt Road Service in Lowell, Arkansas. Upon arrival I found tractor, bobtail, stuck in mud and grass off northwest corner of employee parking. I winched unit out of mud to lot and sent unit on way."

At the hearing Quinn testified it was dark and that although there were marks in the ground[2] from Griffin's vehicle, he did not check to see how deep they were or what damage was done but that it was not deeply entrenched with mud near the tail lights and there was no apparent damage to the tail lights, a condition he would have noticed when he removed the winch cable and inspected the truck for damage the tow itself might have caused.

On March 1, Tressler spoke to Griffin on the phone and told him that he was terminated. Griffin asked why and Operations Manager Rivera got on the phone and stated that it was because he had failed to report an accident and to follow procedures. Although he did not tell Griffin anything further, Rivera testified that he terminated Griffin based on what Tressler had told him, failure to report an accident based on "damage to prison property, to our vehicle, the mud flap, and the rear tail light assembly." Rivera also said that he made the final decision to terminate Griffin after hearing a presentation by Tressler, but without speaking to Griffin. Rivera further testified that: "part of the review process is to review [Griffin's] record. So his collision record, length of employment, I was aware of. His performance record I was aware of. He was a good employee." Rivera also said that with respect to Respondent's accident reporting policy, an employee would not necessarily be considered responsible for failing to report damage he didn't know about, depending on the circumstances.

Griffin applied for unemployment compensation after his termination. The Respondent routinely hires a private contractor, Employer's Unity, to handle such claims. Employer's Unity, as Respondent's agent, submitted documentation in opposition on Respondent's letterhead. The statement said that Griffin was discharged because he "fail[ed] to report an accident." "The claimant took a company vehicle to visit someone in prison. The claimant got the vehicle stuck in some major mud and had to be pulled out by roadside assistance. The truck was pulled out by the front and all the lights in back were broken but not reported by the claimant as required." After Griffin was denied compensation, he applied for review of his claim, the Respondent did not appear before the referee and Griffin was awarded unemployment compensation.

The Respondent's position statement that was submitted to the Board also asserts that the offense of failing to report an accident in subject to "automatic discharge on the first occurrence with no review regardless of the length of service." It cites Respondent's June 1999 reminder to employees that "personal use of a Company vehicle is strictly prohibited and is 'ground for termination.'" Describing Griffin's situation, the statement comments that "[w]hen the truck began sinking into the ground, the damage to the mud flap and brake light occurred." According to the statement, "when confronted about the circumstances, Mr. Griffin admitted that he had bobtailed the truck to that location for personal business, without authorization." Finally, the statement asserts that "the Department of Corrections has requested that Hunt reimburse it for the costs of re-landscaping the damaged area."

Later on April 27, the Respondent contacted Warden Shields and asked that he submit a statement about the event. Shields declined because he concluding that he was being "used" by Respondent inasmuch as the Respondent had not followed up on its offer to compensate the department of corrections. No actual repair work to the grass area was ever performed by anyone.

III. DISCUSSION

This proceeding arose following driver Griffin's collection of union authorization cards between February 11 and 17 and the Union's filing of an election petition on February 18. The Respondent learned of the petition by February 23. The next day the Respondent assigned a regional operations manager to the Philadelphia terminal and he almost immediately began an inquiry into a vehicle towing report which involved Griffin's

[2] The Respondent's photos show shallow depressions of soil where the grass has been displaced or worn off by the (spinning) tires. A so called "bobtail" tractor (the front portion of the tractor-trailer unit), is more inclined to spin its drive wheels under slick conditions as the normal weight of an attached trailer is not there to help provide traction.

assigned tractor. On March 1 Griffin was terminated over the phone by Operations Manager Rivera, assertedly because he failed to report an accident and follow procedures. Additional reasons for his termination were offered at the hearing and in response to Griffin's unemployment compensation claim (asserted damage to his vehicle and a failure to report it), and in response to the Board's complaint (damage to the vehicle, unauthorized personal use of a company vehicle, and a policy of "automatic discharge" for failure to report on accident).

In proceedings involving discharge or disciplinary action against an employee, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employee's union or other protected concerted activities were a motivating factor in the employer's decision to discipline him. Here, the record shows that Griffin was known to management as a spokesperson at employee management roundtable meetings, at driver committee meetings with management (with discussions of proposals including enhancements in pay and benefits), and he was observed by Manager Hicks as he collected union authorization signatures from a group of employees shortly before the union petition was filed. I infer that these circumstances led the Respondent to believe that Griffin was a proponent of the union organizational effort, especially inasmuch as the Respondent's management training literature teaches that persons such as Griffin are prone to spearhead union campaigns among employees. Moreover, the timing of the Respondent's investigation into Griffin's towing incident on Thursday February 24 immediately after the Union's petition was learned of, yet 10 days after February 14, when Griffin notified the Respondent's fleet support department that his vehicle needed road service, and his sudden discharge less than a week latter on Wednesday March 1, all support a strong inference that the action was discriminatorily motivated. Again, this inference is supported by the Respondent's own literature and attitude about unions and its action in immediately assigning Regional Operations Manager DiPasquale to go to Philadelphia to deal with the union organizational attempt (where its sole client was described by manager Hicks as a company that did not want a union at its service facility), see *Howard's Sheet Metal, Inc.,* 333 NLRB No. 49, slip op. at 4 (2001), and *Town & Country Electric v. NLRB,* 106 F.3d 816 (8th Cir. 1997), where the court states that an administrative law judge properly may use an employer's attitudes about union's as one factor in evaluating the record and drawing inferences regarding the employer's motivation.

Under these circumstances, and in view of what appears to be the Respondent's partisan actions in attempting to build a one-sided case against Griffin while, at the same time, interviewing him only briefly, I find that the General Counsel has met his initial burden by presenting a showing sufficient to support an inference that the employee's participation in union or other protected concerted activities was a motivating factor in Respondent's subsequent decision to terminate him. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line*, 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent's defense and whether the General Counsel has carried his overall burden. As pointed out by the Supreme Court, in *Transportation Management Corp.,* supra:

> An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the union and protected concerted activity.

Although the record shows that Griffin was a highly rated, long-term employee, the Respondent claims that even if anti-union animus was present, Griffin would have been terminated anyway because it believed that Griffin had engaged in "serious" misconduct. It bases this conclusion on its contentions (1) that Griffin failed to report the accident in which he was involved to the Respondent's corporate safety office, his dispatcher, or any other company official, (2) that as a result of the accident, he had damaged the prison's property caused damage to the tail light assembly and a mud flap on his vehicle and failed to report either the incident itself or any of this damage, (3) that the Respondent strictly enforced its policy regarding the automatic termination of drivers for failing to report involvement in an accident, and (4) that Griffin's discharged was in accordance with this policy. The Respondent's managers also made the argument that Griffin was using his vehicle on a personal errand without permission when the incident occurred and it pursues this matter on brief, also arguing that the company strictly enforces its no personal use policy.

Much of the Respondent's argument ignores the fact that Manager Tressler informed Griffin of his termination on March 1 without giving any reason and that when Manager Rivera got on the phone after Griffin perused the matter and told him only that it was because he had failed to report an accident and to follow procedures. Rivera claims that he made the termination decision and admits that he did so without speaking to Griffin about the incident. The only opportunity the Respondent had to obtain any modifying factual information about the matter was on February 28 when it disingenuously told Griffin to report to a safety meeting with Tressler and then informed him that it was to be a fact-finding disciplinary meeting because he had failed to report his getting stuck in the mud as an accident. At this point Griffin explained that he had not viewed the incident as on accident and he also explained that he received Tressler's permission to use the vehicle.

In connection with the latter point Griffin credibly testified that he often had been given permission in the past to take his vehicle for personal use, an assertion supported by the testimony of his former supervisor, Charles Pinkett. Moreover, the record shows that even after the Respondent distributed a memo in June 1999 advising drivers they were not to drive their trucks for personal use under any circumstances, such use continued with a manager's permission. Tressler himself admitted that under some circumstances he continued to grant permission for personal use of trucks after the memo's circulation. Tressler did not rebut Griffin's testimony that Tressler specifically told him, in December 1999, that personal use of trucks was permitted so long as the driver had authorization. Griffin credibly testified that after the end of his workday on February 14 (around 12:30 p.m.) he went to the front office and said to

Tressler, "I gotta make a run up on Slate Road. Would it be okay to take my tractor?" Tressler, who was on the phone, looked at Griffin and raised his hand, palm forward. He did not waive the hand sideways or say anything or make any gesture to indicate a negative response. Griffin assumed he had permission, said, I'll see you're latter [sic] on and saw Tressler turn his attention back to the phone.

Tressler filled out an "Accident Review" form after the meeting with Griffin on February 28 in which he noted that Griffin stated he was given permission to take the bobtail truck to visit family member, followed by the initials MT (apparently Mark Tressler), but there is no notation that he disputed Griffin's assertion. In a series of leading questions on direct examination by Respondent's counsel Tressler denied authorizing Griffin to take his truck "to visit a relative in prison" or "home" or "after work" of "discuss" any aspect of such an event. On cross-examination he testified that he couldn't remember any "conversation" with Griffin on February 14 and then said, "[T]o be honest with you I cannot remember if I saw him or not on that day."

Under these circumstances, I find that Tressler's answer at the hearing, a flat "no" to whether he gave Griffin permission to take his truck "after work" as well as his answers under other more descriptive scenarios is unpersuasive in view of his "honest" statement that by couldn't remember any interaction with Griffin on February 14. And, in view of his failure to contradict Griffin on this point at the meeting with Griffin on February 28 or in this report on accident review form, I credit Griffin's specific recall of the occasion and I find that Tressler, without inquiry about the specific reason for Griffin's request, gave nonverbal approval to Griffin. Tressler clearly did not say or do anything to indicate denial of the request, nor did he ask Griffin to wait until he got off the phone. Moreover, the Respondent initially did not assert personal use of a vehicle without permission as the reason for Griffin's termination and it did not investigate his truthful assertion that he had received apparent permission. I find that this additional, but unsubstantiated reason as well as the other shifting reasons described below, indicate that the Respondent reacted to the filing of a union election petition by seizing upon an apparent minor incident involving a known employee spokesperson and elevated the occurrence into a dischargable offense in order to send a message to employees that even well respected drivers were not secure in their employment if they were proponents of union organization.

Tressler, who participated in the preparation of the charges against Griffin and who recommended his termination, admitted that he was aware of the union campaign and that he participated in management's antiunion campaign. The Respondent clearly was aware of union activity and was aware that Griffin was a frequent spokesperson for other employees at roundtable will meetings management. At the time it learned of Griffin's towing incident the Respondent had little in the way of a reasonable apprehension to believe that it had any problem with Griffin, yet it immediately embarked on an aggressive attempt to link a minor incident that Griffin openly had reported to Respondent's fleet support department with something that could be classified as a dischargeable offense.

Regional Manager DiPasquale said he personally began to investigate the incident because he thought there might be damage to the prison property. The Respondent's investigation of the incident, however, proceeded not as a inquiry into whether the Respondent had incurred, any liability (a procedure normally handled by its insurance people) but into an apparent attempt to manufacture or develop some form of property damage (to the prison's grass field), which it transparently exaggerated into "extensive damage to the landscape." The Respondent also immediately accepted responsibility and offered on the spot to pay for damages and it falsely made a report that asserted the prison had requested reimbursement for damages. In this connection, I note that warden Shields' testimony displayed a highly trustworthy and believable demeanor and I find that his testimony accurately described the truth of what actually occurred.

I also find that the site photos (as independently described by the tow truckdriver), show numerous mud ruts that were not attributable to the towing of Griffin's tractor. The tow truck driver's testimony and the photos also show Griffin's ruts were not deep enough to likely to have led to damage to his flaps or tail lights. While the ground was such that mud could have been sprayed on the vehicle, the grass area did not appear to contain gravel that likely could have caused damage. The Respondent, however, took its regular preventive maintenance report of minor damage, an admittedly "hard to detect" broken light assembly and a mud flap that was bent or twisted "a little bit," combined this information into its exaggerated site damage scenario and concluded that Griffin also had caused damage to his vehicle. It then extrapolated this conclusion into the category of an "accident," setting the stage for it to reach the apparently desired final conclusion that Griffin had engaged in a dischargeable policy offense by failing to report his involvement in an accident.

The record indicates that the Respondent had no apparent cost concerns as it quickly volunteered responsibility for all damage at the prison and it made no attempt to seek reimbursement from Griffin for this asserted damage or for the towing cost ($250), associated with his getting stuck assertedly while using his vehicle for personal business.

Although I accept that the Respondent maintains a strict policy with respect to its rules regarding "accidents" and the reporting of accidents, these incidents have generally related to damage to vehicles. Here, the Respondent went out of its way to manufacture and exaggerate a possible scenario of events that would place Griffin in the worst possible light, an approach inconsistent with unbiased motivation. Beyond the fact that Griffin did get stuck and require a tow, the other elements of the accusations against him were based on speculation, were in some instances blatantly untrue (most specifically the assertion that the department of corrections had requested reimbursement for "relandscaping the damaged area"), and were investigated in an abnormal manner in an effect to reach preordained conclusion. While the Respondent usually send an insurance claims adjuster "to protect (it) from liability," in this instance it aggressively and voluntarily sought liability. DiPasquale asserts that because of the towing location (not a business location), he presumed that there was an unauthorized use of the

vehicle and because he was "stuck so bad that he required a tow truck," he "knew that there was damage to the property where he got stuck at DiPasquale notes then describe the location as "off the corner of employee parking." Again, is response to a leading question, DiPasquale agreed "no probably not" when he was asked if he would investigate or send an adjuster if someone was stuck in the mud but not on someone's property, as suggested by counsel "on the shoulder of the road."

The record shows that the Respondent's 1997 driver's manual, page 10, refer to automatic termination for failure to report an "accident" while the same section of the more currant driver's manual for 1999, refers not to "accident" b to a "collision." The Respondent definition of a collision is said to be:

> Any time the vehicle comes in contact with any other vehicle, object, person, animal, or property causing damage or injury, however minor. Any time there is damage to a J.B. Hunt vehicle such as bent wind deflector, mud flap tom off, broken mirror, and the like, regardless of how that damages occurred.

On cross-examination of Respondent's witness DiPasquale, the General Counsel introduced the Respondent's 1998 operations meeting manual and points to a provision that states:

> If a driver is subject to automatic termination, the Project Manager should determine whether or not they feel the driver should be retained. If the PM feels the driver should be retained, they must place in writing their reasons for making that determination and forward to the DCS Review Board.

Manager DiPasquale first agrees with the General Counsel that there are offenses that are deemed automatic termination offenses but which nevertheless may not necessary lead to the driver's termination. On redirect, and in response to Respondent counsel's leading question, DiPasquale first said that the document dealt with accidents in general but he then agreed with counsel's statement that it did not apply to an automatic termination for failure to report an accident.

The clause in the Respondent's manual that referred to possible retention of drivers subject to automatic termination specifically allows a project manager to recommend retention to higher management (including the regional operations manager) by giving written reasons why he "feels" the driver should be retained. This clearly indicates some aspect of discretion. At the time of the termination the action was taken by Operation Manager Rivera who, in effect, approved of Account Manager Tressler's recommendation based on Regional Operations Manager DiPasquale's asserted investigation. Rivera did not bother to speak with Griffin, however, he reviewed Griffin's record and was aware "he was a good employee." Rivera also said that with respect to Respondent's accident reporting policy, an employee would not necessarily be considered responsible for failing to report damage he didn't know about, depending on the circumstances.

Here, I find that management had implied discretion to retain employees subject to automatic termination, that such discretion was not limited to accident points, and that this policy did not preclude retention for failure to report an accident, as suggested by counsel and DiPasquale. In this connection it is noted that when witness DiPasquale gave an ambiguous or potentially unfavorable answer (that the document dealt with accidents in general), to counsel's question, Respondent's counsel then provided a more direct and favorable answer as to, "whether the policy applied to failure to report an accident," and the witness then agreed with counsel that it did not. This was counsel's testimony, not the witness' and it is not entitled to any significant weight that would tend to support the Respondent in its burden to persuasively show that it would have followed this some overall course of action which resulted in Griffin's termination even in the absence of Griffin and other employees' insipid union campaign. Moreover, there is no persuasive explanation given regarding the Respondent's change from referring to "accidents" to referring to "collisions" in its more recent drivers' manual.

Although the Respondent asserts that the incidents are not comparable, the record shows that in August 2000, Respondent's driver Peck got stuck in a ditch when the ground was covered in leaves and he couldn't see it was soft while attempting a U-turn. A wrecker was called but the driver did not report the occurrence to the safety department until he was told to do so the next day. No investigation was made of possible damage to the ground and he was not changed with failure to report an accident.

In the instant case Griffin did not attempt to hide anything and did in fact report the incident to the Respondent's fleet support department as he regarded the matter as a road service situation, not an accident or a collision. In contrast to the Peck situation, no one from management then or thereafter advised him to report it to the safety department. Instead, as soon as Regional Operations Manager DiPasquale learned that something had happened to Griffin's tractor, he personally embarked on an overzealous attempt to link an apparent minor incident with conduct that could be included within the list of Respondent's disciplinary offenses. A main and controlling difference from the Peck situation is the fact that the Respondent had just received the Union's election petition, DiPasquale had just been dispatch to Philadelphia to assess the union situation, and the driver involved, Griffin, was an advocate of greater employee benefit and was the driver's principal spokesperson at employee management meetings.

Here, the Respondent made no real attempt to get any explanatory information from Griffin and DiPasquale reached his own predetermined finding of what it wanted the facts to shown. In a classic case of "command influence" Tessler and Rivera adopted DiPasquale asserted findings and summarily terminated Griffin over the phone, without volunteering any reason. Manager Rivera then said it was for failing to report an accident and to follow procedures but thereafter, in defense of its actions it expanded on its shifting list of accusations of misbehavior and I find that that its overall reasons, as discussed above, must be found to be pretextual and lacking in persuasiveness.

Under the circumstances, I find that although the Respondent has shown the existence of possible legitimate reasons for its termination of Griffin, when viewed in the light of its overall conduct and the demonstrated union animosity these reasons are not persuasive and I conclude that the Respondent would not have pursued a one-sided investigation and so strictly and

arbitrarily interpreted its policies in the absence of Griffin's and the other employees protected and union organizational activity. I find that the Respondent otherwise has not shown that it would have acted in this extreme manner and discharge a top employee even in the absence of his recent union and protected concerted activity and, accordingly, I find that the General Counsel has met his overall burden and shown that Griffin's termination violated Section 8(a)(1) and (3) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging Gregory Griffin on March 1, 2000, because of his union or other protected activity, Respondent has violated Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to necessary affirmative action, it is recommended that Respondent be ordered to reinstate Gregory Griffin to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered because of the discrimination practiced against him by payment to him a sum of money equal to that which he normally would have earned from the date of the discrimination to the date of reinstatement, in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),[3] and that Respondent expunge from its files any reference to the discharge and notify him in writing that this has been done and that evidence of this unlawful discipline will not be used as basis for future personnel action against him.

Otherwise, it is not considered necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, J.B. Hunt Transport, Inc., of Lowell, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee because of his engaging in union or other concerted activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Gregory Griffin full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in theremedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to Gregory Griffin's unlawful discharge and within 3 days thereafter notify him in writing that this has been done and that the evidence of unlawful discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Philadelphia, Pennsylvania facilities copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and job applicants customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the tendency of these proceedings, the Respondent has gone out of business or closed the facility involved in the proceeding, the Respondent shall duplicate and mail, at its expense, a copy of the notice to all current employees and former employees employed by Respondent at its Philadelphia facility at any time since March 1, 2000.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

[3] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amended to 26 U.S.C. § 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp*., 231 NLRB 651 (1977).

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any employee for engaging in union or other concerted activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of this Order, offer Gregory Griffin immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for the losses incurred as a result of the discrimination against him, with interest.

WE WILL, within 14 days of this Order, remove from our files any reference to the discharge of Gregory Griffin and notify him in writing that this has been done and that evidence of the unlawful discharge, will not be used as basis for future personnel actions against him.

J.B. HUNT TRANSPORT, INC.